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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 191

INTERNATIONAL SHOE MACHINE CORPORATION,

Petitioner,

—against—

UNITED SHOE MACHINERY CORPORATION,

Respondent.

RESPONDENT'S BRIEF OPPOSING CERTIORARI

RALPH M. CARSON
1 Chase Manhattan Plaza
New York 5, N. Y.

ROBERT PROCTOR
30 State Street
Boston 9, Mass.

Attorneys for Respondent

June 27 1963

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Supreme Court of the United States

OCTOBER TERM, 1962

INTERNATIONAL SHOE MACHINE CORPORATION, *Petitioner,* —*against*— UNITED SHOE MACHINERY CORPORATION, *Respondent.*	No. 1163

RESPONDENT'S BRIEF OPPOSING CERTIORARI

Citation to Opinions Below

The opinion of the United States Court of Appeals for the First Circuit filed March 11 1963, reprinted as Appendix A to the petition, is officially reported in the advance sheets as 315 F. 2d 449. The District Court's denial of petitioner's motion to vacate judgment is officially reported at 206 F. Supp. 949.

Statement of the Case

Petitioner's Statement (pp. 5-8) is inadequate or incorrect in the following particulars:

1. A prior decision of the First Circuit Court of Appeals granted respondent judgment absolute as to any and all causes of action which accrued before December 14 1952.

275 F. 2d 459. Review by certiorari was not sought, although in a comparable case brought for Hernjan Schwabe, Inc. by the same attorneys against this respondent certiorari was denied by this Court April 30 1962, 369 US 865, and rehearing denied 370 US 920.

2. The careful opinion of the First Circuit Court of Appeals affirming the judgment upon the trial, which occupies 20 pages of petitioner's appendix, reviewed a trial which commenced February 6 1962 before the district judge and a jury, consumed 39 court days (after several days of a first trial terminated by the illness of a juror), and is reflected in a transcript of 5100 pages in addition to hundreds of exhibits. In this long trial petitioner's organizer, chief executive and principal stockholder, Mr. J. S. Kamborian, never ventured to take the witness stand—a fact doubtless noted by the jury.

3. Petitioner's statement that the trial Judge "refused to permit plaintiff to examine witnesses concerning the effect of the Government case and the change in business practices . . ." (Pet. 7) is untrue. The record is full of instances reflecting the introduction of optional sales by respondent, the elimination of non-segregated repair service, the elimination of return charges, and other changes of practice, all effective about June 1 1955 and all pursuant to the Government decree. Such instances are in the printed appendices at PR[1] 286-9, 290, 1783, 1796, 1823-4 and are collected in PR 1429-32 (summation of petitioner's counsel).

4. The statement that the Judge's provision in the pretrial order for the introduction of relevant background evidence "was simply ignored by the trial court" (Pet. 12

[1]This citation "PR" appears in the petition and refers to petitioner's record as filed June 7. We use the same abbreviation and for respondent's record use RR.

fn.) is also untrue. Background material not only was contemplated by the pre-trial order (PR 15) but was received on the examination of such important witnesses as respondent's chairman George Brown (PR 146, 159), and petitioner's machinery expert Peter DePesa (PR 63-71). Sometimes of course this kind of material was properly excluded as irrelevant or cumulative.

5. While refusing to receive in evidence in this 1953-6 case Judge Wyzanski's findings which could speak only of conditions existing up to July 1951; and also his decree pursuant to such findings, the trial Judge instructed the jury fully as to monopolization and the means of monopolization (PR 1404-70). The trial Judge intended to and did state the law to the jury substantially on the basis of Judge Wyzanski's conclusions (PR 1080). These instructions embodied and explained the specific criticisms of respondent's leasing system which Judge Wyzanski had made in the Government case, 110 F. Supp. 295, affd. 347 US 521, and were not excepted to by petitioner.

6. That the jury fully understood these instructions is shown by its answer to Question 1 to the effect that in the 1953-6 period respondent had committed acts of monopolization with respect to the general shoe machinery field (PR 1465, Pet. 7-8), although not with respect to the sub-market of side- and toe-lasting machines to which petitioner almost entirely confined itself (Question 2, PR 1465; Pet. 8). As noted by the court below this sub-market had changed sharply since the close of evidence in the Government case (Pet. App. 16, 315 F. 2d at 458). The affirmative answer to Question 1 was admitted by petitioner to have cured the error charged as to the exclusion of the decree generally. In its brief in the Court of Appeals petitioner said (p. 18):

"The jury's affirmative answer to (1) cures whatever error might have been urged as to the relevance of the final decree in support of appellant's other proof of monopolization of the shoe machinery trade as a whole."[2]

Reasons for Denying the Writ

The two grounds alleged under Rule 19 subd. 1(b) are quite without substance in terms of this record and present no important question of Federal law.

1. The claim that construction by the courts below of Clayton Act § 5 conflicts with and disregards its language (Pet. 9) is quite untenable because that construction turns upon the concept of "estoppel" adopted by Congress in the Clayton Act. The meaning and function of that word in the statute, as extending only to questions distinctly put in issue and directly determined in the Government suit, cannot be in doubt. *Emich Motors Corp.* v. *General Motors Corp.* 340 US 559, 569; *Cromwell* v. *County of Sac* 94 US 351, 353; *Lawlor* v. *National Screen Service Corp.* 349 US 322, 326; *Third National Bank of Louisville* v. *Stone* 174 US 432, 434. The collateral estoppel doctrine requires that both the first and the second proceeding involve the same set of events or documents and the same bundle of legal principles. *Commissioner* v. *Sunnen* 333 US 591, 601-2.

Judge Caffrey on the trial considered and applied the *Emich* case (PR 1085-6). We submit he did so correctly.

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[2]While in the next sentence of this brief petitioner asserted that the negative answer to Question 2 placed the jury "in the incongruous position of finding that monopolization of the whole does not include monopolization of an important part of the whole", the rule as to resolution of alleged inconsistencies in a special verdict is here pertinent. *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.* 369 US 355, 364; and no claim of irreconcilable inconsistency appears in the petition.

In colloquy with counsel on admissibility the trial Judge made the point perfectly clear (PR 222):

> "But my present thinking is, the res adjudicata effect of the government case does not go beyond what was or might have been proved in the case.
>
> I don't conceive it is legally possible to prove in 1953 a fellow was doing something in violation of the antitrust laws in 1955 and 1956. I don't see how it will be prima facie proof of injury, to help the plaintiff in this case. It is my thinking on the government case."

In like manner, the Court of Appeals' opinion cites numerous cases in other circuits approving the practice followed below (Pet. App. 8, 10, 11; 315 F. 2d at 454-6). No conflict among the circuits is claimed in the petition.

We submit the application of Clayton Act § 5 which was made below in strict accordance with prior decisions of this Court is the common-sense and the only just construction of the statute. Acceptance of petitioner's thesis would wrongly permit a treble-damage plaintiff to employ the Government decree on evidence covering a period for which respondent already has judgment, merely "for its aura of guilt, or 'to imply new wrongdoing from past wrongdoing'", (Clark J. in *Monticello Tobacco Co.* v. *American Tobacco Co.* 197 F. 2d 629, 632, cert. den. 344 US 875). Nor is petitioner's case strengthened by its urging that rejection thereof would weaken and impair the efficacy of private actions in complementing the Government in the enforcement of the antitrust laws (Pet. 9), and defeat the purpose of Congress of minimizing the burdens of litigation for injured private suitors, etc. (Pet. 10). The purposes cited are not to be served by departure from the clear statutory meaning and the commission of a plain injustice.

The insistence upon the *date* of the judgment or decree as the only measure of the extent of the estoppel (Pet. 10) is hopelessly artificial, and was well dealt with in the fully-considered opinion of the Court of Appeals (Pet. App. 10-14, 315 F. 2d at 457).

Especially vulnerable is the claim that "The record facts are surely presumed to continue until decision is reached . . ." (Pet. 11). This claimed "presumption" is elaborately negatived by the record here. The sub-market which petitioner in reality almost dominated (viz. side- and toe-lasting machines employing cement) was developed by it very largely after June 1951, when the evidence in the Government case closed. The showing in the record on this point is summarized in a page of the Court of Appeals' opinion (Pet. App. 16-7, 315 F. 2d at 458), and petitioner's submission here is particularly defective for omitting all mention of this important development which differentiates the period covered by the Government record from the 1953-6 period here relevant.

In finding the petitioner was not the victim of monopolization in its special sub-market, the jury acted upon a great volume of evidence, such as the introduction of petitioner's Model C toe laster in mid-1955 (Ganley RR 430; Thompson RR 520), the development of improved cements in 1955-6 (Ganley RR 443, 458; Thompson RR 499; Carr RR 625; Mendl RR 1121-23; Ex. AP, AJ, AK, AL, AO, AR), the perfected models of toe laster and thermalaster in 1955-6 (Volenetz RR 573-4; Stix RR 609; Carr RR 646; Ex. I, BV, CM, DF, GQ, HU, TE, VR, VT). These special facts of the instant case deprive the points emphasized by petitioner of general importance for the law as a whole.

2. The further ground asserted that the Court of Appeals compounded its "basic error" by confining peti-

tioner's proof to the four-year limitations period, is not warranted by the record which shows frequent reception of background evidence within the exercise of a proper judicial discretion (see pp. 2-3 above). As indicated by the argument at Pet. 12, the real purpose at all times was to get before the jury for their prejudicial effect the extensive findings and decree in the Government case covering the irrelevant and barred period. The assertion that the decree and findings were "essential and relevant background" for proof of monopolization *during* the limitations period is patently hollow in a case where a record of 5100 pages was accumulated for the four years in question. Up to June 1 1955 the Form A lease provisions which Judge Wyzanski criticized were in effect, and indeed leases at the option of the lessees continued in effect after June 1 1955 stripped of most of these provisions. This fact was shown in petitioner's case (e.g. PR 1253-4, 1273, 1562-4), but necessarily petitioner was confined to the facts and circumstances of the limitations period itself for proof of the manner in which the Form A leases operated subsequent to the bar of limitations.

That petitioner fully availed of the opportunity to put in evidence as to this period, including evidence concerning the Form A lease terms objected to, appears from the summation of its counsel at PR 1417-27 and 1430-3. To have let into this jury action for damages the full scope of the findings in the Government's equity suit covering a period of 30 years or more, as petitioner insists (Pet. 14), would not only have violated the terms of the existing judgment between the parties but have completely confused the issues. The Court of Appeals was right in concluding that the trial court did not unduly restrict presentation of the petitioner's case (Pet. App. 20, 315 F. 2d at 460).

Conclusion

The petition shows no merit and the writ should be denied.

Respectfully submitted,

RALPH M. CARSON
1 Chase Manhattan Plaza
New York 5, N. Y.

ROBERT PROCTOR
30 State Street
Boston 9, Mass.
Attorneys for Respondent

THEODORE KIENDL
ROBERT D. SALINGER
LOUIS L. STANTON, JR.
Of Counsel

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